No. 80-1181

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM A. MCCALL, SR., ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of the Interior properly rejected petitioners' patent applications for certain sand and gravel mining claims because petitioners failed to make discoveries of valuable mineral deposits on those claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is not reported. The findings of fact and conclusions of law of the district court (Pet. App. A-6 to A-19) are unreported. The opinion of the Interior Board of Land Appeals (Pet. App. A-53 to A-74) is reported at 2 I.B.L.A. 64.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1980. The order of the court of appeals denying rehearing and rehearing en banc was entered on October 17, 1980 (Pet. App. A-30 to A-31). The petition for a writ of certiorari was filed on January 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, as amended by Section 1 of the Act of Sept. 28, 1962, Pub. L. No. 87-713, 76 Stat. 652, 30 U.S.C. 611, provides:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * * .

STATEMENT

This suit concerns 21 sand and gravel placer mining claims encompassing 1,680 acres situated within five miles of the center of Las Vegas, Nevada. The claims at issue are placer claims Las Vegas Nos. 3-6, 8-17, 19-23, 25 and 26.[1]

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[1]The claims at issue here are located in the immediate proximity of petitioners' Las Vegas claims Nos. 1, 2, 7, 18 and 27, which are the subject of a separate petition in No. 80-1180. Other claims, or portions of claims, within the general Las Vegas group were patented and are not a subject of litigation. See map following page 7 of the petition.

These claims were among 27 located in 1948 by petitioners' predecessors in interest. Subsequently, when petitioners applied for patents on various of the 27 claims,[2] the Secretary of the Interior initiated administrative contest proceedings against the claims at issue, alleging, *inter alia*, that no discovery within the meaning of the general mining laws, 30 U.S.C. 22 *et seq.*, had been made because the material could not be marketed at a profit and no actual market had been shown. Pet. App. A-32 to A-33.

A four-day hearing was conducted before an administrative law judge (ALJ) at which the petitioners and the government presented testimony and other evidence concerning the claims. Following the hearing, the ALJ found the claims to be invalid for lack of discovery. Relying upon this Court's decision in *United States* v. *Coleman*, 390 U.S. 599 (1968), the ALJ ruled that a claimant seeking a mining patent based on the alleged discovery of minerals withdrawn from further location by Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, 30 U.S.C. 611, is required to show that the minerals could have been profitably extracted and marketed on the date of enactment of the statute. The ALJ ruled further that petitioners had failed to meet this requirement, noting that significant amounts of sand and gravel had not been removed and sold prior to the controlling date and that the presence of a cemented capping throughout the claims had made mining on them economically infeasible in 1955 and until the recent development of more efficient equipment. Accordingly, the ALJ held the claims to be invalid. Pet. App. A-40 to A-52.

The petitioners appealed to the Interior Board of Land Appeals (IBLA), which affirmed. 2 I.B.L.A. 64 (1971);

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[2]Patents were sought on all of the claims here at issue except for Las Vegas No. 23. See note 1, *supra*.

Pet. App. A-53 to A-74. The IBLA, after reviewing the administrative record in detail, ruled that "the evidence falls far short of that required to establish a valid discovery as of July 23, 1955 [and thus] the claims were properly declared null and void." Pet. App. A-73.

Three years later, in 1974, petitioners filed a complaint in the district court seeking judicial review of the IBLA decision. The complaint alleged, *inter alia*, that the Secretary had acted arbitrarily and capriciously by invalidating the claims and that he had applied an erroneous standard of marketability. The district court held that the Secretary had applied the proper judicially approved standards and that his decision was supported by substantial evidence (Pet. App. A-6 to A-19). Petitioners' motion for reconsideration was denied (Pet. App. A-19 to A-28). The court of appeals affirmed (Pet. App. A-1 to A-6).

ARGUMENT

This case presents no issue warranting review by this Court. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

1. The general mining laws permit a private individual, subject to certain restrictions, to claim for himself such valuable minerals as he may find on the public lands. The mining laws also permit him to obtain a patent for the lands on which such minerals are discovered. See Act of May 10, 1872, ch. 152, 17 Stat. 91, 30 U.S.C. 22 *et seq.* However, as the sole purpose of the mining laws is to encourage actual mineral development, *United States* v. *Coleman*, 390 U.S. 599, 602 (1968), a mining claim, to be valid, must strictly comply with the requirements of the mining laws.

One of the principal requirements of the mining laws is that the claimant must make a "discovery" of a "valuable mineral deposit" within the limits of each claim. *Cole* v.

Ralph, 252 U.S. 286, 295-296 (1920). The classic statement of the test for establishing a discovery of a valuable mineral deposit was made by the Secretary in *Castle* v. *Womble*, 19 Pub. Lands Dec. 455, 457 (1894):

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

This "prudent person" test has been endorsed by this Court on numerous occasions. See, *e.g.*, *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.4 (1978); *United States* v. *Coleman*, 390 U.S. 599, 602 (1968); *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 335-336 (1963); *Cameron* v. *United States*, 252 U.S. 450, 459 (1920). In *United States* v. *Coleman*, *supra*, 390 U.S. at 602, the Court recognized that "profitability is an important consideration in applying the prudent-man test * * * ." Under this marketability criterion, it must be shown that the minerals on the claim can be extracted, removed and marketed at a profit. *Coleman*, *supra*, 390 U.S. at 600; *Melluzzo* v. *Morton*, 534 F. 2d 860, 862 (9th Cir. 1976).

Enactment of Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, 30 U.S.C. 611, withdrew common varieties of sand, gravel, and other similar minerals from further location under the mining laws. *Coleman*, *supra*, 390 U.S. at 603-605. Consequently, claimants, such as petitioners here, who had located common varieties of sand and gravel prior to the effective date of the Act, must establish a discovery by showing that the minerals could have been extracted and marketed at a profit as of July 23, 1955.[3]

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[3]Contrary to petitioners' suggestion the Interior Board Land Appeals did not overrule its decision in this case in *United States* v. *Gibbs*, 13

Cameron v. *United States*, *supra*, 252 U.S. at 456; *Melluzzo* v. *Morton*, *supra*, 534 F. 2d at 862; *Hallenbeck* v. *Kleppe*, 590 F. 2d 852, 856 (10th Cir. 1979).

2. The courts below and the Secretary correctly applied these rules of discovery to the claims at issue. Contrary to petitioners' assertion (Pet. 29-34), the Secretary did not require the claimants to demonstrate that they had actually extracted and sold sand and gravel from each claim. Rather, as the court of appeals correctly observed (Pet. App. A-3 to A-4), the Secretary based its ruling on the absence of evidence to indicate that the materials on the claims could have been mined, processed and marketed at a profit before July 23, 1955, and not on the absence of exploitation itself.[4] A lack of significant actual sales of materials from a claim will, however, support an inference that the materials cannot be profitably marketed. *Cameron* v. *United States*, *supra*, 252 U.S. at 457; *Melluzzo* v. *Morton*, *supra*, 534 F. 2d at 863. Here, petitioners failed to introduce evidence sufficient to overcome the inference.

Similarly, although the ALJ noted that the amount of sand and gravel on the claims greatly exceeded the quantities reasonably needed for a reserve supply (Pet. App. A-44),

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I.B.L.A. 382 (1973). In *Gibbs* (13 I.B.L.A. at 393 n.7), the Board merely criticized language in its *McCall* decision which was subject to misinterpretation. The Board reaffirmed its adherence to the marketability test (ibid.), which was the basis for its *McCall* decision (see Pet. App. A-72).

[4]Petitioners' contention (Pet. 9) that the contest complaint failed to advise them of the significance of the July 23, 1955 date was not raised at the administrative level or in the courts below and may not be considered here for the first time. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). In any event, petitioners' counsel at the administrative hearing understood the government's position to be that petitioners had to show a discovery as of July 23, 1955 (Tr. 415-416), and petitioners have not shown that they were in any way prejudiced by the alleged deficiency in the contest complaint.

the Secretary did not reject the patent applications on the ground that petitioners had located "too much." See *Baker* v. *United States*, 613 F. 2d 224 (9th Cir. 1980), cert. denied, No. 79-1964 (Oct. 20, 1980). Rather, as noted by the court of appeals (Pet. App. A-5 to A-6), the Secretary's finding of lack of marketability was based on the fact that, unlike other claims in the area for which patents were issued, the subject claims were covered at or near the surface by a cemented layer, known as caliche, which increased extraction costs. Thus, the subject claims could not economically compete with other nearby claims containing large quantities of unconsolidated sand and gravel. Pet. App. A-51, A-61.

3. There was substantial evidence in the administrative record to support the Secretary's finding that the sand and gravel from the subject claims could not have been profitably extracted and marketed as of July 23, 1955. At the contest hearing, a government witness who had examined the claims testified that a cemented layer of caliche covered virtually all of the ground encompassed by the claims and that the caliche capping occurred at, or just below, the surface. Pet. App. A-59 to A-60. He further testified that the caliche capping would increase the costs of extraction, and that the subject claims consequently could not compete economically with other nearby claims where the caliche layer was thinner or non-existent. Pet. App. A-61. His testimony was corroborated by the testimony of one of petitioners' own witnesses who stated that sand and gravel producers in the Las Vegas area generally avoided areas capped with caliche until after 1959, when larger equipment which could rip through the capping without drilling and blasting became available. Pet. App. A-65. Since there was substantial evidence in the administrative record to support the

Secretary's decision, that determination was properly upheld by the courts below. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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